

"WHO CONTROLS WHAT"
CHART OF THE SCOPE OF REPRESENTATION

(South Carolina Version)

Kenneth P. Troccoli*
August 28, 2010

<u>Source</u>	<u>Page(s)</u>
Supreme Court	2-3
Fourth Circuit Court of Appeals	4-5
Fifth Circuit Court of Appeals	5-7
South Carolina Supreme Court & Ct. of Appeals Decisions	7-9
Lower Court Decisions Generally (federal & state)	9-10
South Carolina Rule of Professional Conduct 1.2	10-11
South Carolina Published Ethics Advisory Opinions	11
ABA "Standards for Criminal Justice"	11-12

* Assistant Federal Public Defender, Eastern District of Virginia (703-600-0870; kenneth_troccoli@fd.org). This chart is drawn from Kenneth P. Troccoli, *Control Over The Defense: Representing Zacarias Moussaoui*, THE CHAMPION, Dec. 2009, at 30, available on Westlaw at 33-DEC Champ 30.

Source	Decisions the Client Controls	Decisions the Lawyer Controls
Supreme Court	<p data-bbox="548 272 1167 310">"Personal" or "Fundamental" decisions</p> <ul data-bbox="548 354 1167 591" style="list-style-type: none"> <li data-bbox="548 354 1167 391">• to plead guilty or take steps tantamount to pleading guilty <li data-bbox="548 391 1167 428">• to waive the right to a jury trial <li data-bbox="548 428 1167 466">• to testify on his own behalf <li data-bbox="548 466 1167 503">• to take an appeal <li data-bbox="548 503 1167 540">• to be present at trial <p data-bbox="548 634 1199 872"><i>See Brookhart v. Janis</i>, 384 U.S. 1, 7 (1966); <i>Jones v. Barnes</i>, 463 U.S. 745, 751 (1983); <i>Rock v. Arkansas</i>, 483 U.S. 44, 52 (1987); <i>Taylor v. Illinois</i>, 484 U.S. 400, 418 n.24 (1988); <i>Florida v. Nixon</i>, 543 U.S. 175, 187 (2004)</p>	<p data-bbox="1226 272 1593 310">"Strategy" or "Tactics"</p> <ul data-bbox="1226 354 1896 1349" style="list-style-type: none"> <li data-bbox="1226 354 1896 509">• to bar the prosecution from using unconstitutionally obtained evidence (<i>Wainwright v. Sykes</i>, 433 U.S. 72, 91 n.14 (1977)) <li data-bbox="1226 509 1896 747">• to dismiss the indictment because the grand jury was unconstitutionally selected (<i>Tollett v. Henderson</i>, 411 U.S. 258, 267-68 (1973); <i>Francis v. Henderson</i>, 425 U.S. 536 (1976)) <li data-bbox="1226 747 1896 911">• to have the defendant wear civilian clothing during the trial (<i>Estelle v. Williams</i>, 425 U.S. 501, 512-12 (1976)) <li data-bbox="1226 911 1896 1029">• to forego an objection to a jury instruction (<i>Engle v. Isaac</i>, 456 U.S. 107, 128-29 n.34 (1982)) <li data-bbox="1226 1029 1896 1148">• to decline to press a particular issue on appeal (<i>Jones v. Barnes</i>, 463 U.S. 745, 751 (1983)) <li data-bbox="1226 1148 1896 1349">• "to forego cross-examination, to decide not to put certain witnesses on the stand, [and] to decide not to disclose the identity of certain witnesses in advance of trial"

Source	Decisions the Client Controls	Decisions the Lawyer Controls
		<p>(<i>Taylor v. Illinois</i>, 484 U.S. 400, 418 (1988))</p> <ul style="list-style-type: none"> • to provide timely discovery to the prosecution (<i>Taylor v. Illinois</i>, 484 U.S. 400, 418 (1988)) • scheduling matters, including whether to waive the period to proceed to trial under the Interstate Agreement on Detainers (<i>New York v. Hill</i>, 528 U.S. 110, 115 (2000)) • to allow a federal magistrate judge (instead of a district judge) to conduct voir dire and jury selection (<i>Gonzalez v. United States</i>, 553 U.S. 242, 253 (2008)) • to determine what evidentiary objections to raise, including whether to stipulate to the admission of evidence at trial (<i>New York v. Hill</i>, 528 U.S. 110, 115 (2000)) • to decide whether, after consultation, to concede guilt at the guilt phase of a capital case (<i>Florida v. Nixon</i>, 543 U.S. 175, 189 (2004))

Source	Decisions the Client Controls	Decisions the Lawyer Controls
Fourth Circuit Court of Appeals	<p>"Personal" decisions</p> <ul style="list-style-type: none"> entering a guilty plea waiving a jury trial testifying at his own trial pursuing an appeal being present at trial <p><i>See United States v. McMeans</i>, 927 F.2d 162, 163 (4th Cir. 1991); <i>United States v. Lawrence</i>, 161 F.3d 250, 255 (4th Cir. 1998); <i>Sexton v. French</i>, 163 F.3d 874, 885 (4th Cir. 1998); <i>United States v. Chapman</i>, 593 F.3d 365, 368 (4th Cir. 2010)</p>	<p>"Trial strategy and tactics"</p> <ul style="list-style-type: none"> "what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed" (<i>Sexton v. French</i>, 163 F.3d 874, 885 (4th Cir. 1998)) pre-trial motions to suppress evidence (<i>Sexton v. French</i>, 163 F.3d 874, 885 (4th Cir. 1998)) the exercise of peremptory challenges (<i>Gardner v. Ozmint</i>, 511 F.3d 420, 426 (4th Cir. 2007)) deciding not to put on a voluntary intoxication defense at the guilt phase of a capital trial (<i>Hyde v. Branker</i>, 286 Fed. Appx. 822, 833 (4th Cir. 2008) (unpublished opinion)) requesting and/or consenting to a mistrial (<i>United States v. Chapman</i>, 593 F.3d 365, 368 (4th Cir. 2010)) deciding which witnesses to call (<i>United States v. Chapman</i>, 593

Source	Decisions the Client Controls	Decisions the Lawyer Controls
		F.3d 365, 369 (4th Cir. 2010))
Fifth Circuit Court of Appeals	<p>"Personal Fundamental" decisions</p> <ul style="list-style-type: none"> entering a guilty plea waiving a jury trial testifying at his own trial pursuing an appeal <p><i>See Winters v. Cook</i>, 489 F.2d 174, 179 (5th Cir. 1973); <i>Jones v. Estelle</i>, 722 F.2d 159, 165-66 (5th Cir. 1983), <i>overruled on other grounds by Saahir v. Collins</i>, 956 F.2d 115, 119 (5th Cir. 1992); <i>Emery v. Johnson</i>, 139 F.3d 191, 198 (5th Cir. 1997); <i>Vega v. Johnson</i>, 149 F.3d 354, 360 (5th Cir. 1998); <i>United States v. Mullins</i>, 315 F.3d 449, 454 (5th Cir. 2002)</p>	<p>"Strategic" decisions</p> <ul style="list-style-type: none"> constitutional objections to the composition of a grand or petit jury (<i>Winters v. Cook</i>, 489 F.2d 174, 180 (5th Cir. 1973)) stipulations to the admission of evidence (i.e., waiver of a confrontation right), so long as client does not dissent (<i>United States v. Stephens</i>, 609 F.2d 230, 232 (5th Cir. 1980); <i>United States v. Reveles</i>, 190 F.3d 678, 683 (5th Cir. 1999)) stipulations to facts (<i>Berry v. King</i>, 765 F.2d 451, 454 (5th Cir. 1985)) proceeding with an 11-person jury after a juror is excused by court (<i>United States v. Spiegel</i>, 604 F.2d 961, 966 (5th Cir. 1979)) to advance a particular defensive theory to produce an acquittal (<i>Rault v. Louisiana</i>, 772 F.2d 117, 132 (5th Cir. 1985); <i>Vega v. Johnson</i>, 149 F.3d 354, 361 (5th

Source	Decisions the Client Controls	Decisions the Lawyer Controls
		<p>Cir. 1998))</p> <ul style="list-style-type: none"> the presentation of testimonial evidence (<i>United States v. Guerra</i>, 628 F.2d 410, 413 (5th Cir. 1980); <i>Washington v. Watkins</i>, 655 F.2d 1346, 1363 (5th Cir. 1981)) allowing a federal magistrate judge to conduct a civil commitment hearing for a BOP inmate (<i>United States v. Muhammad</i>, 165 F.3d 327, 331 (5th Cir. 1999)) to decline to press a particular issue in a federal habeas proceeding (<i>Jones v. Estelle</i>, 722 F.2d 159, 166 (5th Cir. 1983), <i>overruled on other grounds by Saahir v. Collins</i>, 956 F.2d 115, 119 (5th Cir. 1992); <i>Scheanette v. Quarterman</i>, 309 Fed. Appx. 870, 875 (5th Cir. 2009) (unpublished opinion)) to allow a federal magistrate judge (instead of a district judge) to conduct voir dire and jury selection (<i>United States v. Gonzalez</i>, 483 F.3d 390, 394 (5th Cir. 2007),

Source	Decisions the Client Controls	Decisions the Lawyer Controls
		<p><i>aff'd</i>, 553 U.S. 242, 253 (2008))</p> <ul style="list-style-type: none"> • to allow a federal magistrate judge (instead of a district judge) to conduct plea proceedings (<i>United States v. Underwood</i>, 597 F.3d 661, 672 (5th Cir. 2010)) • to decline to claim an error in a Sentencing Guidelines calculation, so long as client does not dissent (<i>United States v. Chapa</i>, 236 Fed. Appx. 933, 936 (5th Cir. 2007) (unpublished opinion)); <i>United States v. Hernandez-Rodriguez</i>, 275 Fed. Appx. 340, 341 (5th Cir. 2008) (unpublished opinion)) • "to call a particular witness, object to evidence, offer additional evidence or rest, or . . . advance a particular defense at all" (<i>Jones v. Estelle</i>, 722 F.2d 159, 165 (5th Cir. 1983), <i>overruled on other grounds by Saahir v. Collins</i>, 956 F.2d 115, 119 (5th Cir. 1992))
So. Carolina Supreme Court & Court of Appeals	<ul style="list-style-type: none"> • to make a personal closing argument under statutory law at the end of the guilt and penalty 	<ul style="list-style-type: none"> • to have the defendant wear jail attire or civilian clothes at trial (<i>Humbert v. State</i>, 548 S.E.2d

Source	Decisions the Client Controls	Decisions the Lawyer Controls
Decisions	<p>phases of a capital trial (<i>Franklin v. Catoe</i>, 552 S.E.2d 718, 722 (S.C. 2001))</p> <ul style="list-style-type: none"> to settle a civil case (<i>In re White</i>, 663 S.E.2d 21, 28 (S.C. 2008); <i>In re Belding</i>, 589 S.E.2d 197, 201 (S.C. 2003)) 	<p>862, 865 (S.C. 2001))</p> <ul style="list-style-type: none"> to object to the admission of evidence at trial (<i>Watson v. State</i>, 634 S.E.2d 642, 644 (S.C. 2006)) to consult a forensic expert or call an expert witness at trial (<i>Simpson v. Moore</i>, 627 S.E.2d 701, 707, 709-10 (S.C. 2006)) to call a witness at trial (<i>Jackson v. State</i>, 495 S.E.2d 768, 771 (S.C. 1998)) to object to the admission of evidence at trial (<i>Fernandez v. State</i>, 411 S.E.2d 426, 428 (S.C. 1991)) the scope of cross-examination of a government witness (<i>State v. Beam</i>, 518 S.E.2d 297, 300 (S.C. Ct. App. 1999)) which issues to raise on appeal (<i>Tisdale v. State</i>, 594 S.E.2d 166, 167 (S.C. 2004)) to seek rehearing and/or <i>certiorari</i> following an adverse decision of the S.C. Court of Appeals in a criminal direct appeal (<i>Douglas v. State</i>, 631 S.E.2d 542, 543 (S.C.

Source	Decisions the Client Controls	Decisions the Lawyer Controls
		2006))
Lower Court Decisions Generally (federal & state)	<ul style="list-style-type: none"> • waiver of the right to attend important pretrial proceedings • waiver of the constitutional right to a speedy trial • the refusal (by a competent client) to enter an insanity plea • the decision to withhold a defendant's sole defense at the guilt phase of a capital case and use it solely in the penalty phase • waiver of the right to be charged by a grand jury indictment <p>See 3 Wayne R. LaFare et al., CRIMINAL PROCEDURE § 11.6(a) at 776-79 (3d ed. 2007) (listing and digesting supporting authorities)</p>	<ul style="list-style-type: none"> • the exercise of peremptory challenges • bringing juror misconduct to the attention of the trial court • requesting or consenting to a mistrial • requesting the exclusion of some members of the public from a trial • seeking a change of venue, continuance or other relief because of pretrial publicity • moving for a continuance and/or waiving statutory speedy trial rights where doing so is reasonably justified • requesting a competency determination • choosing among different lines of defense that may produce an acquittal • "what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed"

Source	Decisions the Client Controls	Decisions the Lawyer Controls
		See 3 Wayne R. LaFave et al., CRIMINAL PROCEDURE § 11.6(a) at 780- 81 (3d ed. 2007) (listing and digesting supporting authorities)
So. Carolina Rule of Professional Conduct 1.2 (2010)	<p>The “objectives” of the representation</p> <ul style="list-style-type: none"> • what plea to enter • whether to waive jury trial • whether the client will testify 	<p>The “means” of the representation</p> <ul style="list-style-type: none"> • “technical, legal and tactical matters” (Cmt. 2) • actions that are “impliedly authorized to carry out the representation” (1.2(a)) • “lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected” (Cmt. 2) • “may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent” (Cmt. 6) • rule “does not prescribe how . . . disagreements are to be resolved” . . . [but] [t]he lawyer should . . . seek a mutually acceptable resolution” (Cmt. 2)

Source	Decisions the Client Controls	Decisions the Lawyer Controls
		<ul style="list-style-type: none"> unresolved “fundamental” disagreements may be a basis for withdrawal or discharge of the lawyer (Cmt. 2) consultation is required (1.2(a)) lawyer’s duty may change for client with diminished capacity (Cmt. 4)
So. Carolina Published Ethics Advisory Opinions	<ul style="list-style-type: none"> the “objectives” of the representation the extent of the monetary recovery to be sought and discovery pursued (in a civil case) <p>See EAO 06-12, 2006 WL 4666954 (Nov. 17, 2006); EAO 06-10, 2006 WL 4666952 (Aug. 24, 2006)</p>	<ul style="list-style-type: none"> “technical and legal” issues <p>See EAO 05-16, 2005 WL 3873351 (Sept. 16, 2005)</p>
ABA “Standards for Criminal Justice - Prosecution Function and Defense Function” (3d ed. 1993)	<p>“Fundamental” decisions</p> <ul style="list-style-type: none"> what pleas to enter whether to accept a plea agreement whether to waive a jury trial whether to testify in his or her own behalf whether to appeal 	<p>“Strategic and tactical” decisions</p> <ul style="list-style-type: none"> what witnesses to call whether and how to conduct cross-examination what jurors to accept or strike what trial motions should be made what evidence should be introduced, including whether to

Source	Decisions the Client Controls	Decisions the Lawyer Controls
	<p>See <i>also</i> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 448 (2007) (listing the following as the client's decisions: "civil settlements, criminal pleas, waiver of criminal jury trials, and testifying in a criminal trial")</p>	<ul style="list-style-type: none"> object to the admission of evidence whether to stipulate to certain facts